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In the Supreme Court of the United States

OCTOBER TERM, 1978

MICHAEL J. CAPANEGRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 576 F. 2d 973. The opinion of the district court (Pet. App. 25a-50a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22a) was entered on May 15, 1978, and a petition for rehearing was denied on July 5, 1978 (Pet. App. 23a). The petition for a writ of certiorari was filed on August 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, an attorney convicted of embezzling or unlawfully converting funds of a labor union, was

"employed" by the union within the meaning of 29 U.S.C. 501(c).

STATUTE INVOLVED

29 U.S.C. 501(c) provides:

> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

STATEMENT

Following a non-jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on 17 counts of embezzlement and unlawful conversion of union funds, in violation of 29 U.S.C. 501(c).[1] He was sentenced to concurrent terms of imprisonment for a year and a day on each count. The court of appeals affirmed, one judge dissenting (Pet. App. 1a-21a).

The relevant facts are set out in the opinions of the district court and the court of appeals (Pet. App. 2a-5a, 26a-50a),[2] Briefly, the evidence at trial established that in early 1971 petitioner, an attorney, agreed to represent Ricky Carnivale without charge in Carnivale's campaign for election to the presidency of Local 1101 of the Communication Workers of

[1]Petitioner was acquitted by the district court on seven additional counts of violating Section 501(c).

[2]Pursuant to Fed. R. Crim. P. 23(c), the trial judge made special findings of fact.

America. Petitioner's free legal representation was conditioned on his appointment as chief counsel to the union if Carnivale was successful (Tr. 754-756). Carnivale was elected; petitioner was then retained as chief counsel from April 1971 to December 1972, at $25,000 per year (G. Ex. 12, 13, 13A; Tr. 757-761, 921).

In June 1971, just prior to the commencement of a seven-month strike against the New York Telephone Company, the members of Local 1101 voted to pay the legal fees of union members arrested in connection with strike activities (Tr. 639-642, 769-770, 972-973). During the course of the strike, which ended in February 1972, approximately 45 members of the union were arrested for strike-related crimes. Although a few of the members were charged with felonies, the vast majority were charged with minor misdemeanor offenses such as disorderly conduct or harassment. As each arrest occurred, the Local's officers either referred the member to petitioner for representation or advised petitioner of the incident (Pet. App. 3a). Petitioner then submitted bills to the union for his alleged representation (G. Ex. 1-7); he did not submit a copy of the bill to, much less seek payment from, any of the individual members (Tr. 462, 926-930).

Each of the counts on which petitioner was convicted related to his submission of and receipt of payment for these bills, which purported to provide a description of the services rendered to union members but which in fact consistently misrepresented and overstated the nature and substance of petitioner's legal services. In some cases, petitioner submitted bills for services for members whom he never saw or consulted (Tr. 475-480, 484, 552-562, 1115-1131; Pet App. 33a-35a). On several occasions petitioner's only service was to speak to the member on the telephone and to advise him to file a complaint with the police

department (G. Ex. 4, 5; Tr. 196-203, 475-484, 580-586, 1115-1122, 1141-1148). On other occasions petitioner made brief court appearances for members whose cases were adjourned in contemplation of dismissal, but he billed for multiple appearances including trial representation (G. Ex. 6, 10B; Tr. 302, 324, 449-465). Petitioner did not prepare or file a single brief or memorandum of law in connection with any of the members he claimed to represent, yet he billed for that service as well (G. Ex. 4). On various bills, petitioner falsely claimed to have made appearances at police stations and at hearings and to have held witness interviews (see, *e.g.*, G. Ex. 2, 3, 8; Tr. 340, 362, 398, 412-415, 552-558). Finally, in some cases petitioner submitted bills for the representation of members who were actually represented by other counsel (G. Ex. 2, 3, 5, 7; Tr. 335-340, 398, 412-415, 605, 669-674).

Petitioner's bills were paid by the union.[3] Between October 21, 1971, and February 29, 1972, in addition to his regular fee from the union under his retainer agreement, petitioner received 45 checks totalling $113,025 from the Local's Defense Fund (G. Ex. 10A, 10B, 10C, 10D).

ARGUMENT

Petitioner contends that his conduct was not prohibited by 29 U.S.C. 501(c), which applies to "[a]ny person who embezzles * * * or unlawfully * * * converts to his own use * * * any of the moneys * * * of a labor organization of which he is an officer, or by which he is employed, directly or indirectly," because he was not an "employee" of the union and that the contrary holding of the court of appeals violates

[3]Contrary to the union's normal practice, many of these checks were written out, and all were signed, by Carnivale himself (Tr. 625-632, 638-639, 850-854, 934-935; G. Ex. 10B).

his due process rights and departs from the intent of Congress. The decision below, however, correctly construes Section 501(c) in light of its obvious purposes and does not conflict with the decision of any other circuit. There is no need for further review.

The facts established at trial clearly demonstrated that petitioner was "employed" by the union within the meaning of the statute. Pursuant to a written agreement, petitioner was hired to serve as chief counsel to Local 1101, handling all of its legal affairs, for $25,000 per year (Pet. App. 6a-7a; G. Ex. 12, 13). During the period that petitioner provided representation to members with legal difficulties stemming from the strike, the union officers either referred the member involved to petitioner or advised him of the incident directly (Pet. App. 7a). None of the fees in these cases was paid by the union members, nor did petitioner seek payment from the individual members. In the legal papers petitioner submitted in connection with the members' cases, he stated that he had been retained by the union, not the members, and he described himself as chief counsel to the Local (see, *e.g.*, G. Ex. 1406, 1908). Moreover, even prior to the strike petitioner attended and spoke at union gatherings, and he was at the Local's office daily working on union business (Pet. App. 7a; Tr. 782). In sum, as the court of appeals concluded, petitioner "by express agreement and in fact was employed by the Union" (Pet. App. 7a) and thus was subject to the proscriptions of Section 501(c).

Nonetheless, petitioner argues that he was employed as an "independent contractor" and that Section 501(c) should be construed to extend only to those satisfying the common

law definition of an "employee."[4] But while petitioner, who maintained his own offices outside the union, may not have been an "employee" of the union in the common law sense of a servant as distinguished from an "independent contractor," that distinction is irrelevant to the question posed here. The language of the statute does not speak of "employees" or "servants," and its coverage is not so limited. To the contrary, Section 501(c) expressly imposes criminal liability on "[a]ny person" who loots the funds of a union "by which he is employed."

The terminology chosen by Congress is not without significance, since it has defined the word "employee" in other contexts to exclude independent contractors. See, *e.g.*, 29 U.S.C. 152(3).[5] This difference in coverage frequently makes sense. In some areas, such as in determining the group with which an employer must bargain on issues such as wages, hours and conditions of

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[4]This is no merit to petitioner's claim that Section 501(c) would be unconstitutionally vague if it were construed to include all those employed by a union. "It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States* v. *Powell*, 423 U.S. 87, 92 (1975), quoting *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975). Whatever the situation might be in cases where the employment relationship between a union and an independent contractor is sporadic or tangential, here the overwhelming evidence established that, regardless of how petitioner and Carnivale chose to structure the terms and conditions of petitioner's union duties, his employment relationship with the union was virtually indistinguishable from that of a regular, full-time employee.

[5]The definition of the term "employee" in the Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519, of which Section 501(c) is a part, does not specifically include or exclude independent contractors from its coverage. 29 U.S.C. 402(f).

employment (29 U.S.C. 158(d)), for example, it is reasonable to exclude independent contractors, who depend upon a fee rather than wages and who themselves decide how the work will be done (see Pet. App. 11a n.6). On the other hand, the purpose of this particular statutory provision—to protect union funds (see 29 U.S.C. 401)—is not at all served by excluding from its coverage a trusted legal advisor who is able to gain access to those funds. The court of appeals put the matter well (Pet. App. 8a-9a):

> The issue here is not the vicarious tort liability foisted upon a master by virtue of the unauthorized activity of his servant. Such liability is based on familiar *respondeat superior* concepts which lead to exculpation where the person employed performs the work without being subject to the control of his employer. The lawyer, like the physician, is a professional and if he is guilty of malpractice it may well be that under common law doctrine his employer will not be responsible in damages to one injured as the result of the lawyer's tortious activity. * * * Here we are construing a statute enacted by Congress to protect union funds against pilferage by any person it employed. [Petitioner] was given such employment by the Union as its Chief Counsel. This employment provided him with the opportunity, which he clearly seized, to take illicit advantage of Union funds. Whether he was an independent contractor, agent, or servant, was not the concern of Congress. This is clear from the language which Congress chose in §501(c).

In short, the court of appeals properly declined to restrict the scope of Section 501(c) to those persons meeting the common law definition of "servant" or "employee" when Congress did not use those terms and the restriction would

subvert the legislative intent. See *United States* v. *Culbert*, No. 77-142 (March 28, 1978).[6] Petitioner's "brazen scheme of looting the Union coffers" (Pet. App. 5a) was precisely the type of conduct the statute was designed to prevent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]Contrary to petitioner's contention (Pet. 9-11), the decision of the court of appeals is not in conflict with prior decisions in the Second and Sixth Circuits as to whether the words "directly or indirectly" in Section 501(c) modify the terms "embezzle, steal, abstract or convert" rather than the verb "employed." Since the court below found that petitioner was "directly" employed by the union, it was not necessary for it to address the government's contention that a person "indirectly" employed by a labor organization would fall within the coverage of the statute, and it therefore expressly declined to address the issue (Pet. App. 7a n.3).

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